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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91295; File No. SR-ISE-2021-03]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Pricing Schedule at Options 7, Section 3

March 10, 2021

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on March 2, 2021, Nasdaq ISE, LLC ("ISE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Pricing Schedule at Options 7, Section 3 (Regular Order Fees and Rebates), as described further below.

The text of the proposed rule change is available on the Exchange's Website at https://listingcenter.nasdaq.com/rulebook/ise/rules, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's Pricing Schedule at Options 7, Section 3 (Regular Order Fees and Rebates) to: (i) Decrease the Priority Customer[3] taker fee in Select Symbols,[4] and (ii) increase the Non-Priority Customer[5] maker fee in Select Symbols.

The Exchange initially filed the proposed pricing changes on March 1, 2021 (SR-ISE-2021-02). On March 2, 2021, the Exchange withdrew that filing and submitted this filing.

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3 A "Priority Customer" is a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), as defined in Nasdaq ISE Options 1, Section 1(a)(37).

4 "Select Symbols" are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Interval Program.

5 "Non-Priority Customers" include Market Makers, Non-Nasdaq ISE Market Makers, Firm Proprietary / Broker Dealers, and Professional Customers.

Today, Priority Customers are charged a taker fee of $0.41 per contract for regular orders in Select Symbols. The Exchange now proposes to decrease this fee to $0.37 per contract for Priority Customers.

Today, all Non-Priority Customers are charged a maker fee of $0.11 per contract for regular orders in Select Symbols. The Exchange now proposes to increase this fee to $0.18 per contract for all Non-Priority Customers.[6]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' … As the SEC explained, '[i]n the U.S. national market system,

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6 The Exchange notes that under this proposal, Market Makers that qualify for Market Maker Plus in Select Symbols will continue to receive the applicable Market Maker Plus rebates in Select Symbols set forth in note 5 of Options 7, Section 3, and will not pay the proposed $0.18 per contract maker fee.

7 15 U.S.C. 78f(b).

8 15 U.S.C. 78f(b)(4) and (5).

buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'…."[9]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."[10]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

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9 NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

10 See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

The Exchange believes that the proposed decrease for the Priority Customer taker fee in Select Symbols is reasonable, equitable, and not unfairly discriminatory. As discussed above, this fee will decrease from $0.41 to $0.37 per contract for Priority Customers. The Exchange seeks to incentivize Priority Customer participation, in particular, Priority Customer activity to remove liquidity in Select Symbols, with the proposed change. As amended, Priority Customers will continue to be charged the lowest taker fee in Select Symbols.[11] The Exchange believes that it is equitable and not unfairly discriminatory to charge Priority Customers a lower taker fee than other market participants as the Exchange has historically offered lower execution fees to Priority Customers. Furthermore, Priority Customer order flow enhances liquidity on the Exchange for the benefit of all market participants by providing more trading opportunities, which in turn attracts Market Makers and other market participants who may interact with this order flow.

The Exchange believes that the proposed increase for the Non-Priority Customer maker fees in Select Symbols is reasonable, equitable, and not unfairly discriminatory. As discussed above, this fee will increase from $0.11 to $0.18 per contract for all Non-Priority Customers. While the maker fee is increasing for Non-Priority Customers, the proposed increase is intended to offset the cost of decreasing the Priority Customer taker fee proposed above. Furthermore, the Exchange notes that the proposed maker fees remain lower than maker fees at another options exchange.[12]

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11 Today, the Exchange charges all Non-Priority Customers (except Market Makers) a taker fee of $0.46 per contract in Select Symbols. Marker Makers are currently charged a taker fee of $0.45 per contract in Select Symbols.

12 See, e.g., Nasdaq PHLX ("Phlx") Pricing Schedule at Options 7, Section 4, which assesses Lead Market Makers and Market Makers an electronic options

The Exchange believes that the proposed maker fees in Select Symbols is equitable and not fairly discriminatory because they will be increased uniformly for all Non-Priority Customers. Priority Customers will continue to be assessed no maker fees in Select Symbols under this proposal. For the same reasons discussed above for the proposed Priority Customer taker fees, the Exchange believes that it is equitable and not unfairly discriminatory to continue offering a lower rate to Priority Customers compared to other market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of intra-market competition, the Exchange does not believe that its proposal will place any category of market participant at a competitive disadvantage. The proposed Select Symbol taker fee will be decreased for Priority Customers, who will continue to be charged at a lower rate than all other market participants for removing liquidity on the Exchange. The proposed Select Symbol maker fee will be increased uniformly for all Non-Priority Customers, while Priority Customers will continue to be assessed no fee for adding liquidity on the Exchange. As discussed above, the Exchange has historically charged lower rates to Priority Customers compared to other market participants. The Exchange believes that this incentivizes increased Priority Customer order flow, which enhances liquidity on the Exchange for the benefit of all market

transaction charge of $0.22 per contract in Penny Symbols, and Professionals, Broker-Dealers, and Firms an electronic options transaction charge of $0.48 per contract in Penny Symbols.

participants by providing more trading opportunities, which in turn attracts Market Makers and other market participants who may interact with this order flow.

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other options exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. For example, while the Exchange is increasing the maker fees for Non-Priority Customers in Select Symbols under this proposal, the Exchange does not believe this will cause an undue burden on inter-market competition as the proposed fees remain lower than similar fees charged by other options exchanges such as Phlx.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[13] and Rule 19b-4(f)(2)[14] thereunder. At any time within 60

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13 15 U.S.C. 78s(b)(3)(A)(ii).

14 17 CFR 240.19b-4(f)(2).

days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-ISE-2021-03 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-ISE-2021-03. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2021-03 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

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15 17 CFR 200.30-3(a)(12).